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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 518.

MEYER ACKERMAN et al.,
Petitioners,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF

In Opposition to Certiorari.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

Footnote to Page 8, Line 22.

Of the three cases, other than this, whereof opinions are set out in the pending petition (Allen v. Globe-Democrat, p. 24a, Irwin v. Globe-Democrat, p. 40a, Monterosso v. Globe-Democrat, p. 45a) and which are interrelated to this case by petitioners at page 26 of their petition, Allen has become final because no petition for certiorari was filed, and Irwin and Monterosso have been the subject of petitions (Nos. 415 and 414, respectively, October Term, 1963) which were denied by this Court Nov. 12, 1963, after this brief had gone to press.

INDEX.

	Page
Table of Cases	This Page
Statement	1
Summary of Argument	3
Argument:	
Mootness	4
No Federal Decision	6
Adequate State Grounds	13
Estoppel	17
Exhibits Referred to:	
A. Minutes, Missouri Supreme Court	1
B. Minute and Certificate of Last Entry in Missouri Circuit Court	2
C. Petitioners' Motion for Rehearing, Etc.	2, 15, 16
D. Petitioners' Trial Brief	9
E. Petitioners' Statement, Brief and Argument	10, 20

Cases Cited.

Black v. Cutter Laboratories, 351 U. S. 297, 298, 76 S. Ct. 824, 827 13

Crowell v. Randall, 35 U. S. (10 Pet.) 368, 392, 9 L. Ed. 458, 467 11

Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. ed. 2d 837, 863 (1963) 14

Radio Station WOW v. Johnson, 326 U. S. 120, 128, 129, 65 S. Ct. 1475, 1480 14

Robinson v. Gaines, 331 S. W. 2d 653, 655 18

Virginian Ry. Co. v. Mullens, 271 U. S. 220, 227, 228, 46 S. Ct. 526, 529 22

Statutes and Rules Cited.

Section 301 (a), L. M. R. A. 7, 19, 21
Section 490.110, Mo. R. S. 1959 18
28 U. S. C. 2101 (f) 5
Missouri Supreme Court Rules:
Rule 23.1 (d) 8
Rule 27.20 6
Rule 27.31 6
Rule 75.01 5
Rule 83.16 4
Rule 84.02 4

Textbooks Cited.

3 Am. Jur., App. and Error, § 876 21
5 C. J. S., App. and Error, § 1501 21

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STATEMENT.

This litigation stems from a collective bargaining agreement and, more particularly, from those provisions in that agreement which set forth the conditions under which the employer was committed to pay severance pay. In short, this case involves the construction of a written agreement.

Throughout, the petitioners here initiated and litigated the issues on the basis of local law (*infra* § IV). On that basis they prevailed at the trial. On that basis, the Missouri Supreme Court reversed the judgment in petitioners' favor (Pet. 19a) and directed the entry of judgment for respondent (Exh. A, p. 3). Thereafter, the petitioners moved for rehearing, or in the alternative, for a hearing

en banc. Then, for the first time, petitioners attempted to inject a federal question, i. e., that the court should have construed the contract not under local Missouri law (as petitioners had previously requested), but under federal substantive law (Exh. C, p. 3, etc.). This attempt was repulsed by the Missouri Supreme Court in an opinion holding that the new issue was raised too late, and pointing out that no difference between applicable Missouri and federal law had been cited or found (Pet. 19a *et seq.*; *v.* also *infra* II, III).

Petitioners took no steps to stay the mandate of the Missouri Supreme Court (Exh. C). Accordingly, the mandate was issued to the Circuit Court which entered judgment in favor of respondent (Exh. B). Petitioners took no measures to stay or suspend the finality of that judgment (Exh. B) and the Missouri courts are now powerless to act in respect of that judgment.

SUMMARY OF ARGUMENT.

I. Petitioners' application for a writ of certiorari presents a moot question. Petitioners failed to stay the mandate of the Missouri Supreme Court and failed to stay or suspend the finality of the judgment entered by the Circuit Court of the City of St. Louis pursuant to said mandate. Under Missouri law, neither Court now has jurisdiction to take any action in respect of said judgment and would be powerless to respond to any order of this Court.

II. Petitioners present no proper grounds for review of the final judgment of the Missouri Supreme Court. The two federal questions set forth in petitioners' brief (Pet. 3) were not duly raised and decided. Question 1, dealing with the inviolability of jury verdicts, is presented by petitioners for the first time in their brief on this application. Question 2, regarding the application of federal substantive law to the enforcement and interpretation of the contract provisions for severance pay, was not ruled upon in the final judgment below.

III. The judgment of the Missouri Court is supported by adequate independent non-federal State grounds: i. e., the alleged federal questions was raised too late, viz., on motion for rehearing.

IV. Petitioners have demanded the application of Missouri contract law throughout this litigation. Hence, they are now estopped from asserting that the Missouri Courts deprived them of a federal right by adjudicating the merits of this contract dispute under principles of Missouri contract law.

ARGUMENT.

I.

Mootness.

This petition is moot; for no order of this court can now give petitioners relief; petitioners have never made any effort to stay the effectiveness of the orders below, and the judgment entered thereon has become final beyond the jurisdictional power of any court to set aside or modify. The chronology of the events after the appeal recorded in the courts' minutes is as follows:

Missouri Supreme Court*	Jan. 29, 1963	Argued and submitted;
" "	April 8, 1963	Reversed; all concur;
" "	June 4, 1963	Respondent's motion to rehear or transfer overruled;
" "	June 20, 1963	Mandate and certified copy of opinion mailed to Clerk of Circuit Court, City of St. Louis.
Missouri Circuit Court*	July 2, 1963	Mandate and opinion of Supreme Court filed; judgment of November 21, 1961, set aside and new judgment entered for defendant

* The Supreme Court minutes are authenticated in Exhibit A, and those of the Circuit Court in Exhibit B, filed herewith with the Clerk.

The action of transmitting the mandate, on the sixteenth day after the filing of the order overruling the motions of respondent, was taken at that time in accordance with Missouri Supreme Court practice; because no further motion (e. g., to stay the mandate) was filed by respondent within the fifteen-day time limit fixed by Missouri Supreme Court Rules (Rule 83.16 and Rule 84.02) for filing post-opinion motions.

There was a twelve-day lapse (June 20-July 2) before the trial court, acting upon the mandate, was to enter the requisite judgment, during which respondent could have

requested the Supreme Court of Missouri to recall the mandate, pending an application for certiorari, but they did not do so.

After the trial court entered the judgment on July 2, under Missouri law the trial court retained for 30 days power to vacate the judgment, to permit the plaintiffs effectively to pursue their application for certiorari; but they did not seek vacation. After that time the trial court lost jurisdiction. Rule 75.01 of the Missouri Supreme Court reads as follows:

> "The trial court retains control over judgments during the 30-day period after entry of judgment, and may vacate, reopen, correct, amend or modify its judgment for good cause within that time . . ."

Thus petitioners had from June 4, 1963, when the Missouri Courts finally decided the case, until August 2, 1963, when the Missouri courts finally lost jurisdiction over the case, to implement their application for certiorari by staying the finality of the judgment. For this period of fifty-eight days petitioners made no effort to do so. Although later efforts would have been ineffective, petitioners have not even yet taken any step in this direction.

There is not the slightest reason to suppose that either Missouri court would, if requested, have refused a stay or vacation or have imposed impossible conditions upon the granting of either. However, ample remedy would have been available to respondent in such an event under 28 U. S. C. 2101 (f) by obtaining a stay in the Supreme Court of the United States. The section provides:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

(Cf. also Supt. Ct. Rules 27.50 and 27.51).

Interest reipublicae ut sit finis litium.

The Supreme Court of Missouri exhausted its jurisdiction when the Circuit Court entered judgment in conformity to the mandate it had received. The Circuit Court's jurisdiction expired thirty days after the entry of the judgment. To whom, then, would this court issue its mandate on final decision? And what action would it require therein? Obviously, this court's mandate could not require the Supreme Court of Missouri to take further action in the case "in accordance with this opinion"; for the case is not, and would not be, before that court. To be effective the mandate would have to be addressed to the Missouri legislature; requiring it to enact laws to revest jurisdiction in the Missouri Supreme Court in such a situation as this.

This case is as moot as that of the condemned criminal, executed during the pendency of the certiorari proceedings because his lawyers failed to obtain a stay.

II.

No Federal Decision.

The Missouri Courts did not decide a federal question. Petitioners *concede* that until their motion to transfer

or rehear they never throughout the litigation invoked a federal right (Pet. 25). We can then confine our search, to learn whether a federal question was presented and decided, to petitioners' motion to transfer or rehear and to the opinion on the motion. The court's opinion on the motion is included in the petition at page 19-a.

Two federal questions are said to be presented (Pet. 3):

> (1) Whether the principle of the inviolability of a jury verdict supported by evidence within reason applies to an action governed by Section 301 (a) of the Labor Management Relations Act, 1947 * * *
>
> (2) Whether * * * federal substantive law governing the enforcement and interpretation of an L. M. R. A., § 301, agreement, correctly formulated and applied, requires the conclusion that severance pay is due.

(a) Question 1.

Reference to the opinion of the Missouri Supreme Court on the motion shows that the Supreme Court touched neither hide nor hair of the asserted Question No. 1. The federal question brought before that court is very completely paraphrased in this opinion (Pet. 20-a, 21-a), and there is not the slightest suggestion of a contention (let alone a ruling) on the question of whether Section 301 (a), L. M. R. A., makes the jury verdict inviolable.

Counsel are just plain mistaken in inferring by the question that the verdict was "supported by evidence within reason". The fact is that evidence on the meaning of the contract words was objected to by petitioners and generally **excluded** by the trial judge. As to the disputed phrase "who lose employment thereby", the court categorically instructed the jury to apply petitioners' interpretation (R. 492).

The Missouri Supreme Court noted (Pet. 8):

> "The [trial] court refused an offer by Globe-Democrat to prove that among the persons engaged in the printing trade and printing business in the St. Louis area the word 'printing' means the mechanical reproducing of type on paper, and the word 'publication' means the making public of printed matters. Plaintiffs introduced no evidence that in the trade 'publication' is understood as the equivalent of 'printing' or that the Globe-Democrat Publishing Company as a corporation had been involved in any merger or consolidation."

It follows that there was no verdict at all on the application of half of the disputed contract clause, and that there was no evidence permitted and hence no meaningful trial by the jury on the application of the other half of the phrase. To speak of inviolability of the jury verdict in such circumstances is to ignore the requirements of Rule 23.1 (d) of this court that the questions presented be "expressed in the terms and circumstances of the case".

Petitioners include in their appendix opinions in other cases, and even an Appendix F, containing a summary of data (by who knows whom?) completely dehors of the record, not subject to cross-examination or rebuttal, the inclusion of which is not justified by any rule of this court, of Missouri evidence, or federal procedure. But neither the petition nor its appendix (nor, so far as we know, the record filed by petitioners*) includes petitioners' motion to transfer or rehear. In order that the court have means to judge further whether Question No. 1 is "expressed in the terms and circumstances of the case", we have filed a certified copy of their motion to transfer

* Respondent was not served with a copy of "The proceedings in the Supreme Court of Missouri" filed as a part of the record by Respondents. This may include briefs as well as minutes.

or rehear with the Clerk of this Court as Exhibit C to this brief. Reference to the motion shows that there were 11 major points and 9 sub-points made. That petitioners were at that time belatedly attempting to create a federal question is apparent from the fact that of the 20 points and sub-points, 12 made direct mention of a federal question or federal labor law as a basis for the asserted point. But **this** federal question was not raised. The only point that mentions a jury verdict is Point XI (Motion, page 11); but it does so as an assertion of a right based on local law. Unlike the points which raised a federal question, as to which federal authorities were cited, this point is supported by one single authority, a decision of the St. Louis Court of Appeals which expresses rules for interpretation of a Missouri contract. Significantly, this point is the only point of the 11 which is not developed and discussed in the petitioners' suggestions. The suggestions (pages 12 through 40) discuss Points I through X. There follows a "Conclusion" (page 39). That the point asserts a right only under Missouri law of interpretation of contracts is immediately evident from reading it, and we have set it out at Appendix A to this brief.

Doubtless the reason Point XI was not argued was because it was in the teeth of petitioners' constant contention throughout the litigation **that it was not for the jury to decide what was meant by the contract words in controversy.**

Petitioners' Trial Brief (Exhibit D), page 7, reads:

> "It is plaintiff's position that it is for the Court to construe said phrase. The law is quite clear that construction of a written contract is within the province of the Court, **and such duty is not to be delegated to the jury**" [And so on].

Evidence on which alone the jury could make a decision as to the parties' meaning by the words was objected to by petitioners (R. 132) and sustained (R. 134).

Petitioners offered (it was refused) a peremptory instruction defining the meaning of "permanent suspension of publication" (R. 485).

Petitioners offered (it was given) a peremptory instruction defining the meaning of "lose employment thereby" (R. 492).

Petitioners' Statement, Brief and Argument (Ex. E), pp. 72, 73, argued:

> "The trial court should have directed a verdict for Respondents on all of these issues as a matter of law on the face of the contract. Even after the trial court permitted extrinsic evidence to be introduced, all of that evidence sustained Respondents' interpretation of the Agreement, and a verdict should then have been directed for Respondent. Under such circumstances, Appellant could not have been injured by a submission of construction of the Agreement to the jury. • • •"

Apparently petitioners just could not, in the light of such a history of a contrary position, bring themselves to argue a point commencing:

> "The Court erroneously invaded the province of the jury and substituted its own findings as to the intended meaning of the phrase 'merger, consolidation or permanent suspension of publication' • • •."

In any case, the point involved Missouri law, **not** Federal law.

Petitioners **here** cite in support of their argument on Question No. 1, eleven opinions of the United States Supreme Court—mostly cases arising under the Federal Employers' Liability Act (Pet. 15, 16, 17). None of these

cases was cited below; none of the arguments was made below.

Thus it appears that while Question No. 2 was belatedly posed, after the opinion on the merits in the Supreme Court of Missouri, Question No. 1 was never raised at all in the state courts. It appears for the first time in the petition for certiorari.

In view of the brass-bound rule of law that this court will not entertain on certiorari what was neither presented nor decided below, it would appear, as to the first question presented, that this case is **not** the "suitable vehicle to decide the question" which petitioners believe it to be (Pet., p. 19).

As far back as 1836, Mr. Justice Story, in Crowell v. Randall, 35 U. S. (10 Pet.) 368, 392, 9 L. Ed. 458, 467, after reviewing all the cases down to that time, thus states the rule:

> "It is not sufficient to show that a [federal] question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case."

(b) Question 2.

Let us turn now to the second question said to be presented (Pet., p. 3). There is no doubt that this point, unlike Question No. 1, was in fact raised by petitioners' motion to transfer or rehear. However, this question was not decided by the Missouri Supreme Court, since the court held that it was raised too late.

Petitioners twice in their petition (Pet. 12, Pet. 25), the latter time in italics, quote the opinion of the Missouri Supreme Court as saying, anent the second question:

> "We will consider the matter . . ."

Bob-tailed and shorn of its context, like this, the quotation makes it look as if the Missouri Supreme Court did

consider and decide the asserted federal question. But when we take the rest of the sentence, and the rest of the paragraph, out of the shadow where petitioners left them, we find that this was not so.

What the court said (after stating the petitioners' point [App. 60-a] and ruling that it was made too late under local procedure, App. 21-a, 22-a) was:

> "We will consider the matter, however, sufficiently to point out the following: Although on original submission respondents cited no federal cases, but only Missouri cases and cases from other states, and on this motion for rehearing have not cited any federal cases construing a provision similar to Article XI, our original research, and our research on this motion for rehearing, was conducted in the case law of both hierarchies, state and federal. We have found no federal cases construing such a provision or a similar provision and we are of the opinion that there are no ruling cases in the federal courts applying any different rule or reaching any different result on comparable facts. Respondents have not shown that our decision is contrary to any federal decisions on this subject. We consider our decision not inconsistent with the existing body of federal law. The parties were accorded a review of the provisions of the contract under applicable law on the merits in accordance with accepted principles of construction and on the basis of what the parties said in their agreement. Neither respondents nor appellants were entitled to prevail on the basis of what they intended to say or might have said, or on the basis of the effect a certain construction may have upon industrial peace, nor on any basis except the merits of their contentions."

Thus it is clear that the Missouri court did not retreat from ruling the case, as it had done originally, on the

Missouri principles of law invoked by plaintiffs throughout the litigation. It "considered the question" only "sufficiently to point out" the lack of federal authority, cited or found, showing "that our decision is contrary to any federal decisions on this subject," and it concludes this phase of the opinion by saying (Pet. 22-a):

> "**Having decided this case on its merits** we do not conceive it to be our function to sustain respondents' position in this case willy-nilly, 'lest it be summarily returned to this court by the Supreme Court of the United States,' as respondents' counsel warn on page 12 of their suggestions."

III.

Adequate State Grounds.

In any application here for review by certiorari, the federal question to be reviewed must have been a decision which controlled the result of the case. If there be in addition an adequate independent non-federal ground for the decision, it would do no good to review, and mayhap reverse, the decision of the federal question, since the judgment, on the other stated grounds must go the same way, regardless of the outcome of the review of the federal question.

The principle is well stated in Black v. Cutter Laboratories, 351 U. S. 297, 298, 76 S. Ct. 824, 827, as follows:

> "This Court, however, reviews judgments not statements in opinions. Herb v. Pitcairn, 324 U. S. 117, 125-126, 65 S. Ct. 459, 462-463, 89 L. Ed. 789; Morrison v. Watson, 154 U. S. 111, 115, 14 S. Ct. 995, 997, 38 L. Ed. 927. See also Williams v. Norris, 12 Wheat. 117, 118, 120, 6 L. Ed. 571. At times the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are

made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. Herb v. Pitcairn, supra; Williams v. Kaiser, 323 U. S. 471, 477, 65 S. Ct. 363, 366, 89 L. Ed. 398."

The principle is applicable whether the independent non-federal ground be substantive or procedural.

In Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. ed. 2d 837, 863 (1963), this court held:

"It is a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds (citing authorities). Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 86-87, denied this Court power to base the reversal of a state court decision on any error other 'than such as * * * immediately respects * * * questions of validity or construction of the said (Federal) Constitution, treaties, statutes, commissions, or authorities in dispute.' * * * Murdock [v. Memphis] was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds."

It was expressly held applicable in Radio Station WOW v. Johnson, 326 U. S. 120, 128, 129, 65 S. Ct. 1475, 1480, to independent non-federal procedural grounds, as follows:

"Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.

"This brings the situation clearly within the settled rule whereby this Court will not review a state court

decision resting on an adequate and independent non-federal ground even though the state court may have also summoned to its support an erroneous view of federal law (quoting authority)."

Reference to the Missouri Supreme Court's opinion on the motion to transfer or rehear shows that it expressly decided that the alleged federal question was raised too late.

The court's statement was categorical (Pet. 20-a):

> **"The attempt to inject a federal question for the first time in the motion for rehearing came too late to secure a transfer to the court en banc, under our practice and procedure."**

Petitioners attempt in a footnote (Pet. p. 17) to avoid the overwhelming effect of this statement by distinguishing between the quality of federal questions necessary for transfer to banc and for certiorari.

But this is totally irrelevant, for, contrary to petitioners' footnote, **there were not two motions, nor were there two federal questions**—one raised to support transfer and another raised to support rehearing.

There was but one federal question raised (notwithstanding the presentation of two here), and in all aspects it was raised at the same time, i. e., **too late**, in the same paper. The points made in support of the petitioners' motion were stated but once, in support of either relief asked. The motion read (Ex. C, p. 1):

> "Come now Meyer Ackerman et al., Respondents herein, and respectfully move this court * * * to grant Respondents a rehearing of this cause, or, in the alternative, to transfer this cause to the court en banc, and as grounds for this motion Respondents state that (1) there is a Federal question involved; * * *"

Note that petitioners there spoke of "**this** motion" and of "**a** Federal question." Their treatment of this application, as a single motion on a single Federal ground (plus other state grounds), is iterated in their conclusion (Ex. C, p. 39) which says:

> "In support of **such request** [for either relief] Respondents submit that, as pointed out hereinabove, (1) there is **a federal question** involved; * * *"

There is no distinction made in the opinion (nor have petitioners pointed out any in Missouri law, nor have we found any) as to the **TIME** at which a federal question may be raised for a motion to transfer, on the one hand, and for a motion for rehearing, on the other. If it is too late for one, it is necessarily too late for the other.

It is true that in the opinion the court discussed the alternative relief asked separately; but it showed no disposition whatever to forgive the lateness of the assertion for the purposes of a rehearing. Notice the phrase "As indicated" in the passage we next quote from the opinion. This passage followed the categorical denial of transfer quoted above and the statement of petitioners' federal claim, and immediately precedes and illuminates the wounded sentence by which petitioners claim to have overcome their failure to invoke a federal right. The passage is (Pet. 21-a):

> "The suggestion that federal labor policy and federal substantive law governs the construction of this agreement is a new theory, introduced into this litigation for the first time on the motion for rehearing. As indicated, the case was not submitted on any such theory, either in the trial court or in this court. No reference was made in respondents' brief on appeal to federal law, in urging us to adopt their interpretation of Article XI. Both sides treated all questions for decision as questions arising under local law and

determinable by local law. New propositions and complaints, not made in the original briefs, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S. W. 769, 778, and raised for the first time after the opinion is handed down by the Supreme Court, Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410, 418, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, en banc, Mo. Sup., 274 S. W. 2d 286, 292, ordinarily will not be considered on motion for rehearing. We will consider the matter, however, sufficiently to point out the following: . . ."

Thus it is evident that the court held that the only federal question presented was raised too late; and there is no doubt that adequate, independent non-federal grounds for the decision on petitioners' motion were given in the opinion denying the same, and hence no jurisdiction lies in this court to review it.

IV.

Estoppel.

Petitioners are estopped from asserting here that the court below erred in not formulating and applying federal substantive law to the resolution of the issues, because throughout the litigation they asserted their rights under the Missouri substantive law of contracts.

Petitioners admit (Pet. 25):

> "It is true, however, that not until the motion for rehearing or to transfer the case to the court below *en banc* was there a specific advertence to Section 301 (a) of the Labor Management Relations Act, 1947, and the effect exerted by that section in creating federal law controlling the interpretation and enforcement of the agreement."

This is a case not of the mere late assertion of a federal right correlative to or confirmatory of a state right (as of a belated assertion of federal due process, where the litigant had relied earlier upon state due process).

On the contrary, this is a case of the late assertion of a federal right antithetical to, and destructive of, the state law which the litigant has previously relied upon.

Petitioners have contended throughout the litigation that their rights must be decided under principles of local substantive law. The local courts have done so. Now petitioners assert that in doing precisely what they requested, the court has violated federal law.

This is more than the assertion of a federal question too late; it is the assertion of contrary positions in the same case.

While we think the estoppel necessarily follows from the foregoing admission and the nature of petitioners' *volte-face*, it may be helpful to show, beyond the admission that federal law was **not** asserted, the fact that local law **was** asserted as the basis for petitioners' right of recovery.

Petitioners were the plaintiffs below. It was up to them to assert some right, which entailed asserting that the right arose under some law. They sued in the Missouri courts. They invoked no law of any other jurisdiction or authority (R. 1-19), and, under the Missouri procedure, they are therefore presumed to rely upon Missouri substantive law alone. Section 490.110, Mo. R. S. 1959; Robinson v. Gaines, 331 S. W. 2d 653, 655.

No hint or suggestion of reliance on federal law appears in the instructions offered by petitioners for the presentation of their case to the jury (R. 485, 490, et seq.).

Petitioners knock down a straw man (Pet. 14), by denouncing, as "sheerest cavil", an anticipated question

whether the industry in which petitioners were employed affected commerce. Nobody poses such a question. The anticipatory denunciation does not defer us, however, from pointing out that a finding somewhere along the line must be made that petitioners were employed in an industry affecting commerce in order for rights to arise under Section 301 (a), L. M. R. A. Petitioners recognize this as expressly inherent in the very wording of the statute, because the initial predicate for the questions they present here is (Pet. 2):

> "A collective bargaining agreement in an industry affecting interstate commerce . . ."

Yet the entire trial record is devoid of any such allegation or submission. It was the plaintiffs who chose the field of battle. They could have chosen the field of the federal law, in which case they would have invoked Section 301 (a), L. M. R. A., and alleged and proved or secured a stipulation that the employment was in an industry affecting commerce. They did not. They chose as the field of battle the Missouri substantive law, and they will not now be heard to say that the Missouri courts should be reversed for refereeing the battle on that field instead of on the one petitioners passed by.

Even more explicit proof is available that it was the petitioners themselves who made the "error" which they now seek to hang upon the Missouri courts as a basis for jurisdiction here.

We have filed with the Clerk of this Court as Exhibit D to this brief an authenticated copy of the Trial Brief containing petitioners' basic arguments in the trial court, and as Exhibit E hereto a certified copy of their brief in the Supreme Court of Missouri.

The Trial Brief contains thirteen citations to and quotations of judicial opinions.

Not only is there no reference to the federal statute,—not only is there not a single federal opinion included,—but ALL THIRTEEN CITATIONS ARE TO DECISIONS OF THE COURTS OF MISSOURI.

We quote from the Trial Brief as follows:

Page 4. "Missouri law is well established to the effect that . . ." (Citing two Missouri cases and a Missouri statute).

Page 5. "Moreover, the St. Louis Court of Appeals has so ruled in the case of . . ." (citing Missouri opinion).

Page 6. "It is, therefore, clear that under the contract provisions and the law of this state that . . ."

Page 7. "Citing a multitude of cases, including Missouri cases, as being in accord, the annotation in 65 A. L. R. 648, 650-651, gives . . ."

Page 7. "The Missouri courts have consistently upheld the rule that . . ."

Page 8. "Earlier, the St. Louis Court of Appeals had said much the same in . . ."

Page 11. "To repeat what was said by the St. Louis Court of Appeals in . . ."

These quotations make understandable the eight separate record references to Missouri-declared law by the court or by petitioners' counsel in the course of the trial (R. pp. 103, 151, 152, 269, 271, 274, 402 and 458).

Exhibit E, Respondents' Statement, Brief and Argument, similarly presented the cause on appeal as one to be decided under principles of local substantive law.

Throughout this document there is no reference to any federal right. In their Points and Authorities (pp. 25-30), petitioners make 35 references to court opinions and two to statutes. Of the 35 citations to court opinions, 5

are to a decision of each of the States of Minnesota, Montana, North Carolina and Nebraska, and to one of the United States Supreme Court, and two are to the same New Jersey case (The one U. S. case antedated the adoption of Section 301 (a), L. M. R. A. in 1947). The remainder of 28 citations are to Missouri decisions, and the two statutes referred to are Missouri's.

That the Missouri Supreme Court understood their brief to involve Missouri law (as indeed how else can it be understood?) is evident from the shocked statement in the court's opinion on the motion to rehear, etc.:

> "Both sides treated all questions for decision as questions arising under local law and determinable by local law" (Pet. 21-a).

Thus, the petitioners invited the Missouri Supreme Court, as they had invited the Missouri trial court, to determine their rights under principles of Missouri contract law. They will not now be heard to assert that the Missouri courts should be reversed for having done so.

> "An appellant or plaintiff in error is estopped, or will not be permitted, to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to, or which he has invited or induced the trial court to commit, as where the ruling, or error, was made at his request or suggestion, or on his urging, or where he procured the making of the ruling or the taking of the action." 5 C. J. S., App. and Error, § 1501.
>
> "The rule is well settled that a party cannot successfully complain of error for which he is himself responsible or of rulings which he has invited the trial court to make." 3 Am. Jur., App. and Error, § 876.

In Virginian Ry. Co. v. Mullens, 271 U. S. 220, 227, 228, 46 S. Ct. 526, 529, this court held:

> "The plaintiff also seeks to support the judgment on the theory that * * * But he is not in a position to urge this contention here. The case stated in the complaint was distinctly in tort. There was no question of a contract obligation, nor any reference to either of the two deeds. And when the court came to charge the jury the plaintiff tendered and the court included in its charge various instructions wherein the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below."

CONCLUSION.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Point XI in Respondents' Motion for Rehearing or, in the Alternative, for Transfer to the Court en Banc and Suggestions in Support Thereof.

"The Court erroneously invaded the province of the jury and substituted its own findings as to the intended meaning of the phrase 'merger, consolidation or permanent suspension of publication' when the Court's opinion makes it plain that different conclusions might reasonably be drawn from this language. When the Court in construing the agreement said (Op. p. 12) that it looked 'at the relationship of the parties, the subject matter of the contract as a whole, the surrounding facts and circumstances to the extent that they are shown and bear upon the matter, and any practical construction the parties themselves may have placed upon the agreement by their acts and conduct,' it conceded, in effect, that the severance pay provision was ambiguous and that different conclusions might reasonably be drawn therefrom, otherwise resort to these criteria would be unnecessary. If the severance pay provision was ambiguous and different conclusions might reasonably be drawn therefrom, then the determination of the issue was for the jury and not for the trial court or this Court.

"National Corporation v. Allan, 280 S. W. 2d 428, 432."